

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM SINGER : CIVIL ACTION
 :
 v. :
 :
 COMMISSIONER OF INTERNAL REVENUE SERVICE :
 & DEBORA RIELLY, DISTRICT DIRECTOR OF :
 PHILADELPHIA DISTRICT OF THE INTERNAL :
 REVENUE SERVICE, et al. : NO. 99-2783

MEMORANDUM AND ORDER

HUTTON, J.

January 7, 2000

Presently before the Court are Defendant the Internal Revenue Service's ("Defendant" or "IRS") Motion to Dismiss (Docket No. 3), William Singer's ("Plaintiff") response thereto (Docket No. 4), and Defendant's opposition to Plaintiff's response (Docket No. 5). For the foregoing reasons, said Motion is **GRANTED**.

I. BACKGROUND

Pro se¹ Plaintiff sued the Commissioner of the Internal Revenue Service (the "Commissioner") and Debora Rielly ("Rielly"), the Director of the Philadelphia District of the IRS, for violation of the Privacy Act. 5 U.S.C. § 552a. Plaintiff alleges that defendants violated his rights under the Privacy Act when the IRS

¹ Plaintiff is proceeding pro se. The Supreme Court, in Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 (1972), indicated that pro se plaintiff's complaints should be construed liberally. See also Lewis v. Attorney Gen. of the United States, 878 F.2d 714, 722 (3d Cir. 1989)(stating that "[a] pro se [litigant's] pleadings should be ... construed liberally."). The Court is mindful of the Court's admonition and liberally construes both Plaintiff's Complaint and response to the instant Motion to Dismiss.

failed to produce certain documents requested under the Freedom of Information Act "(FOIA)", 5 U.S.C. § 552. The IRS contends that it fully complied with each of Plaintiff's FOIA requests. The IRS acknowledges, however, that the documents produced in response to Plaintiff's second request were somewhat different from the documents produced in response to Plaintiff's first request. The difference is demonstrated the figures reported in each response. The IRS's second set of responsive documents contain larger debt figures as interest accrued with the passage of time between requests. The IRS filed the instant Motion to Dismiss on July 30, 1999.

II. STANDARD OF REVIEW

A. Legal Standard for Fed. R. Civ. P. 12(b)(1) & (2) Motion

Under Rule 12(b)(1), a challenge to a federal court's subject matter jurisdiction may be brought at any time. See Halstead v. Motorcycle Safety Found., No. 99-2199, 1999 WL 997474, at *2 (E.D. Pa. Oct. 29, 1999); see also Fed. R. Civ. P. 12(b)(1) (permitting a challenge to subject matter jurisdiction to be made by motion). If the court is lacking subject matter jurisdiction, the court shall dismiss the action. See Fed. R. Civ. P. 12(h)(3). Pursuant to a Rule 12(b)(1) challenge to subject matter jurisdiction, the plaintiff bears the burden of proving that the relevant jurisdictional requirements are satisfied. See Development Fin. Corp. v. Alpha Housing & Health Care, 54 F.3d 156,

158 (3d Cir. 1995); Mellon Bank (East) PSFS v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992); Gehling v. St. George's Sch. of Medicine, Ltd., 773 F.2d 539, 542 (3d Cir. 1985). A Rule 12(b)(1) challenge may be either a factual or facial challenge to the complaint. See Mortensen v. First Fed. Savings & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). "In the case of a factual challenge, the court is free to consider and weigh evidence outside the pleadings to resolve factual issues bearing on jurisdiction and to 'satisfy itself as to the existence of its power to hear the case.'" See Gould Elec., Inc. v. United States, No. 99-1130, 1999 WL 817719, at *1 (E.D. Pa. Oct. 12, 1999) (quoting Mortensen, 549 F.2d at 891). When the challenge is facial, however, the court must accept as true all well-pleaded allegations in the complaint and draw reasonable inferences in favor of the plaintiff. See Mortensen, 549 F.2d at 891. Under Rule 12(b)(1), existence of disputed material facts will not preclude the court from evaluating the merits of the jurisdictional claim. See Mortensen, 549 F.2d at 891.

A Rule 12(b)(2) motion presents a defendant's challenge to the court's exercise of in personam jurisdiction. Such a motion "requires resolution of factual issues outside the pleadings, i.e., whether in personam jurisdiction actually lies." Clark v. Matsushita Elec. Indus. Co., Ltd., 811 F. Supp. 1061, 1064 (M.D. Pa. 1993)(quoting, Time Share Vacation Club v. Atlantic Resorts,

Ltd., 735 F.2d 61, 66 n.9 (3d Cir. 1984). It is clear that because lack of in personam jurisdiction is a waivable defense under Fed. R. Civ. P. 12(h)(1), it is the defendant who must raise lack of personal jurisdiction by filing a motion to dismiss under Fed. R. Civ. P. 12(b)(2). See Santana Prod., Inc. v. Bobrick Washroom Equip., 14 F. Supp. 2d 710, 712-13 (M.D. Pa. 1998). Once the defense is raised, however, the burden shifts to the plaintiff to prove that exercise of jurisdiction is permissible through the production of sworn affidavits or other competent evidence. See Carteret Savings Bank, FA v. Shushan, 954 F.2d 141, 146 (3d Cir. 1992), cert. denied, 506 U.S. 817, 113 S. Ct. 61 (1992). At no point may a plaintiff rely on the bare pleadings alone in order to withstand a defendant's Rule 12(b)(2) motion to dismiss for lack of jurisdiction; once the motion is made, the plaintiff must respond with actual proofs not mere allegations. See Clark, 811 F. Supp. at 1064.

III. DISCUSSION

The IRS argues that the Court lacks in personam jurisdiction over the named plaintiffs as the Privacy Act does not authorize private civil actions against individuals for alleged violations of its provisions. Notwithstanding careful consideration of Plaintiff's Mandatory Judicial Notice of Plaintiff's Motion to Strike the Internal Revenue Service's Motion to Dismiss Filed by the Department of the Treasury Acting Through

the Internal Revenue Service and its Representatives' [sic], the Court agrees.²

Section 552a(g)(1) of the Privacy Act provides that "[w]henever any agency fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency" 5 U.S.C. § 552a(g)(1)(D). Therefore, while civil actions may be brought against an agency, individual officers and employees of an agency may not be sued under the Privacy Act. See Chocallo v. Bureau of Hearings & Appeals, SSA, 548 F. Supp. 1349, 1369 (E.D. Pa. 1982).

Plaintiff names two individuals--the Commissioner and Rielly--as the sole defendants in the instant lawsuit. The Court lacks in personam jurisdiction as the Commissioner and Rielly cannot be sued under the Privacy Act. Accordingly, Plaintiff's Complaint is dismissed with prejudice pursuant to Rule 12(b)(1).³

² While Plaintiff filed a response to the IRS's Motion to Dismiss, Plaintiff's response is not responsive to the issues raised in Defendant's Motion. First, Plaintiff does not his burden on of showing the existence of either in personam or subject matter jurisdiction. Second, Plaintiff raises matters (e.g., fraud, conspiracy, etc.) not raised in his complaint. This is prohibited by the federal Rules of Civil Procedure. Third, Plaintiff proffers specious arguments that are irrelevant to the instant matter. For example, the Court is turned around by Plaintiff's "hokey pokey" argument and cannot figure out what said argument is all about. (See Pl.'s Mandatory Judicial Notice of Plaintiff's Motion to Strike the Internal Revenue Service's Motion to Dismiss Filed by the Department of the Treasury Acting Through the Internal Revenue Service and its Representatives' [sic] at ¶ 2).

³ Plaintiff's response to Defendant's Motion does not clarify whether or allege that the IRS is a defendant in this lawsuit. Nevertheless, assuming arguendo that Plaintiff filed the instant action against the IRS, an agency of the federal government, dismissal would still be appropriate. As stated previously, Plaintiff fails to meet his burden of demonstrating that subject matter jurisdiction exists. Second, the IRS twice furnished documents in response to Plaintiff's FOIA requests. Plaintiff fails to demonstrate that the documents provided were not responsive to his requests or that documents were wrongly withheld. A federal court only may exercise

To the extent that Plaintiff's Mandatory Judicial Notice of Plaintiff's Motion to Strike the Internal Revenue Service's Motion to Dismiss Filed by the Department of the Treasury Acting Through the Internal Revenue Service and its Representatives' [sic] requests the extraordinary remedy of injunctive relief, said request is denied. Plaintiff does not demonstrate whatsoever that injunctive relief is either justified, lawful, or appropriate.

An appropriate Order follows.

jurisdiction over a Privacy Act or FOIA cause of action where the agency improperly withheld agency records. See De Luca v. INS, No. CIV.A. 95-6240, 1996 WL 103784, at *1 (E.D. Pa. March 8, 1996). The record provides the Court with an adequate basis on which to hold that the IRS complied with FOIA. See Pennsylvania Dept. of Pub. Welfare v. United States, No. CIV.A. 99-175, 1999 WL 1051963, at *1 (W.D. Pa. Oct. 12, 1999). Accordingly, had Plaintiff sued the IRS, the Court would have lacked subject matter jurisdiction over the suit and dismissal under Rule 12(b)(2) would have been appropriate as documents were not wrongly withheld from Plaintiff.

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O R D E R

AND NOW, this 7th day of January, 2000, upon consideration of the Internal Revenue Service's ("Defendant" or "IRS") Motion to Dismiss (Docket No. 3), William Singer's ("Plaintiff") response thereto (Docket No. 4), and Defendant's opposition to Plaintiff's response (Docket No. 5), IT IS HEREBY ORDERED that:

(1) Defendant's Motion to Dismiss is **GRANTED**; and

(2) Plaintiff's prayer for injunctive relief is **DENIED**
with prejudice.

BY THE COURT:

HERBERT J. HUTTON, J.